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Reasonable for Whom? A Consideration of the Appropriate Reasonableness Standard Where Battered Woman Syndrome Evidence is Relevant to a Duress Defense

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REASONABLE FOR WHOM? A CONSIDERATION OF THE
APPROPRIATE REASONABLENESS STANDARD WHERE
BATTERED WOMAN SYNDROME EVIDENCE IS RELEVANT
TO A DURESS DEFENSE

*Samantha Stephey**

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I. INTRODUCTION

The legal system in the United States punishes women who do not leave their abusive husbands despite a rational fear of death if they try to escape.¹ Mrs. Evelyn Charlene Ellis was married to Mr. Hubert Owen Ellis, a drug dealer.² Mr. Ellis was arrested after selling “three pounds of pot” to a confidential informant wearing a listening device.³ Mr. Ellis eventually pled guilty to possession with the intent to distribute Schedule I controlled substances, and was sentenced to ten months in prison.⁴ Subsequently, the court entered an order forfeiting the defendant’s real property to the United States, but after a bench trial, the order was vacated.⁵ The United States appealed this finding, arguing it was undisputed that Mrs. Ellis “consented to her husband’s drug activity within the meaning of the forfeiture act.”⁶ Mrs. Ellis, however, argued she was entitled to a defense of duress given that she believed her husband would have physically harmed her if she had spoken up regarding his conduct.⁷

In support of her argument, Mrs. Ellis informed the court she had discovered Mr. Ellis had murdered his previous wife by beating her to death.⁸ Mrs. Ellis was also a victim of abuse by her husband and recounted a time her husband choked her when she “inadvertently

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1. Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1, 6–9 (2013).

2. *United States v. Sixty Acres in Etowah Cnty.*, 930 F.2d 857, 858 (11th Cir. 1991).

3. *Id.* at 858–59.

4. *Id.* at 859.

5. *Id.* Property forfeiture can be part of a defendant’s criminal conviction and is generally “limited to the property interests of the defendant.” *Types of Federal Forfeiture*, U.S. DEP’T JUST. (Feb. 17, 2022), <https://www.justice.gov/afms/types-federal-forfeiture> [<https://perma.cc/J2SX-KSFP>]. The purpose of forfeiture is to “deprive criminals of the proceeds of their crimes” and “to recover property that may be used to compensate victims and deter crime.” *Id.*

6. *Sixty Acres*, 930 F.2d at 859.

7. *Id.*

8. *Id.* at 860.

allowed the pigs to escape.”⁹ Additionally, Mrs. Ellis stated that Mr. Ellis had threatened to kill her, and a witness testified that Mr. Ellis told them that, “if [Mrs. Ellis] had reported [her husband] to federal authorities about drug dealing, she wouldn’t be here today.”¹⁰ Another “witness described Mr. Ellis as a ‘madman,’” one of his stepdaughters described him as “the devil,” and “[a]nother stepdaughter personally testified that she and her sister were as frightened of Mr. Ellis as their mother was.”¹¹ Mrs. Ellis’s mother also “succumbed to one of Mr. Ellis’ [sic] threats by executing a deed when he demanded it.”¹² Evidence was also presented that “Mr. Ellis owned several guns, including a semi-automatic rifle,” and he “drank as much as half a case of beer a day.”¹³

Despite this testimony, the appellate court indicated it could not “substitute, as the district court appeared to do, a vaguely-defined theory of ‘battered wife syndrome’ for the showing of duress courts have always required[,] to excuse otherwise criminal conduct.”¹⁴ The court found that “circumstances justify a duress defense only when the coercive party threatens *immediate* harm which the coerced party cannot reasonably escape.”¹⁵ The court further found that Mrs. Ellis’s fear of her husband did not rise to this level of immediacy and thus could not be used to support her defense.¹⁶ Mrs. Ellis’s home was subsequently forfeited to the United States government.¹⁷

This case, among others, highlights the fact that generally, criminal law is written in a way that discounts female and non-white perspectives.¹⁸ Although Battered Woman Syndrome¹⁹ has become

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 861.

16. *Id.*

17. *Id.*

18. See Lynn H. Schafran, *Is the Law Male: Let Me Count the Ways*, 69 CHI. KENT L. REV. 397, 400–01 (1993). “[I]n the law, men’s life experience and perspective have been treated as the norm. For example, rape laws are a codification of men’s fears of false accusations.” *Id.* at 401. “Furthermore, the law, including criminal law and enforcement, contribute to the maintenance of racial hierarchy.” Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23, 89 (2014).

19. The language that we use regarding survivors of abuse is important. See *The Language We Use*, WOMEN AGAINST ABUSE, <https://www.womenagainstabuse.org/education-resources/the-language-we-use> [<https://perma.cc/9PKL-4ZNL>] (last visited

accepted as evidence in support of self-defense claims, its application in other legal claims and defenses has not been implemented across the board.²⁰ The slow acceptance of Battered Woman Syndrome as evidence related to a woman's defense in the aftermath of conduct related to their abuse is a clear example of how the law caters to the white, male perspective and is resistant to change.²¹

This comment will consider the evolution of the law as it relates to Battered Woman Syndrome, explain why the reasonable person standard should be more inclusive, and propose that the expanded version of the standard should be used more broadly across the criminal law landscape. Part II defines Battered Woman Syndrome and explains its scientific and legal significance in the criminal legal system and explores a current circuit split regarding the use of Battered Woman Syndrome evidence in duress cases.²² Part III discusses the reasonable person standard as a patriarchal and male-dominated standard which has evolved into a more inclusive standard in other legal contexts.²³ Part III further examines how this evolution has not been seen across the board in criminal law.²⁴ Part IV will aver that a balanced, subjective reasonable person standard would be most appropriate for use in the criminal law context and should be accepted in more defenses, such as in the case of duress.²⁵ Additionally, Part IV will explain what impact this expanded standard would have on women, especially in their ability to present Battered Woman Syndrome evidence.²⁶

II. BACKGROUND ON BATTERED WOMAN SYNDROME

The term Battered Woman Syndrome (BWS) was coined in the 1970s by Lenore Walker to describe the psychological impact of

Apr. 14, 2023) (describing the importance of language use when describing survivors of relationship violence). Battered Woman Syndrome is an outdated term in today's vernacular, and this author acknowledges that some feminists view the term as stigmatizing to women. It will be used in this paper due to its consistent use as a legal term of art that is often utilized in the cases on the subject. Additionally, this author acknowledges that relationship violence does not solely exist in male-female relationships, but the scope of this paper will be limited to that perspective.

20. *See infra* Section II.A.2.

21. *See infra* Section II.A.2.

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part III.

25. *See infra* Part IV.

26. *See infra* Part IV.

domestic violence.²⁷ BWS is typically used to “explain the behavior of certain women who suffer abuse from their . . . partners[.]”²⁸ A woman is considered a battered woman if she is “repeatedly subject to any forceful physical or psychological behavior by a [partner] in order to coerce her to do something [they] want her to do without any concern for her rights.”²⁹

Initial BWS research revealed a three-phase cycle of violence that characterizes battering relationships.³⁰ These phases begin with a period of escalation of tension, typically characterized by slighter acts of abuse, “such as name-calling, other mean intentional behaviors, and/or physical abuse.”³¹ As the actions escalate, the woman often responds with attempts to placate the abuser.³² The second phase consists of the battering incident.³³ In some cases, the woman will trigger the incident in order to allow her to control the conditions, in hopes of minimizing injury.³⁴ Over time, women in battering relationships become adept at predicting when the battering incident will occur.³⁵ The final phase of the cycle is often referred to as the “honeymoon phase.” During this period, the batterer will apologize profusely, promise that he will not be violent again, and show kindness and remorse.³⁶ If the tension in the relationship remains extremely high, even during the third phase, it is “a sign that the risk of a lethal incident is very high.”³⁷

Although not a behavioral health diagnosis, scholars find BWS to share significant symptomology with post-traumatic stress disorder, which is recognized in the Diagnostic and Statistical Manual of

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27. See LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* 33 (Sheri W. Sussman ed., 4th ed. 2017).
 28. Lauren Champaign, *Battered Woman Syndrome*, 11 *GEO. J. GENDER & L.* 59, 59 (2010).
 29. See *id.*
 30. See WALKER, *supra* note 27, at 91.
 31. *Id.* at 94.
 32. *Id.* at 97.
 33. *Id.*
 34. *Id.*
 35. *Id.*
 36. Roxanne Dryden-Edwards, *Domestic Violence*, EmedicineHealth, https://www.emedicinehealth.com/domestic_violence/article_em.htm [<https://perma.cc/YU9G-ETSH>] (last visited Apr. 14, 2023); see also WALKER, *supra* note 27, at 98.
 37. See WALKER, *supra* note 27, at 98. Walker has noted that in some cases, the honeymoon phase is not readily visible, and the woman never feels out of danger. Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 *NOTRE DAME J.L., ETHICS & PUB. POL'Y* 321, 330 (2012).

Mental Disorders (DSM).³⁸ BWS is characterized by seven groups of criteria that identify the syndrome.³⁹ These are:

- (1) Intrusive recollections of the trauma event(s),
- (2) Hyperarousal and high levels of anxiety,
- (3) Avoidance behavior and emotional numbing usually expressed as depression, dissociation, minimization, repression, and denial,
- (4) Negative alterations in mood and cognition,
- (5) Disrupted interpersonal relationship from the batterer's power and control measures,
- (6) Body image distortion and/or somatic physical complaints, and
- (7) Sexual intimacy issues.⁴⁰

These criteria can manifest in a variety of ways and impact how an abused individual will act.⁴¹ Women who experience BWS often display a decrease in self-esteem, an emotional dependence on their abusive partner, and a type of "learned helplessness" deriving from the woman's inability to predict or control the violence in her relationship.⁴² Additionally, the woman may simply "accept" her

38. Taylor Davis et al., *Neurological Evidence and Battered Women Syndrome*, CORNELL U.L. SCH., https://courses2.cit.cornell.edu/sociallaw/student_projects/neurologicalevidence.html [<https://perma.cc/EQV2-K8EE>] (last visited Apr. 14, 2023). The DSM also recognizes gender-based differences in the diagnosis of post-traumatic stress disorder (PTSD) and how the disorder manifests differently in women and men. PTSD is more prevalent among females than males across the lifespan seemingly due to "a greater likelihood of exposure to traumatic events, such as rape, and other forms of interpersonal violence." *Id.*

39. See WALKER, *supra* note 27, at 50.

40. *Id.*

41. See Cynthia Lynn Barnes, Annotation, *Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist in Evaluating Victim's Testimony or Behavior*, 57 A.L.R. 5th 315 (2021).

42. *Id.* The concept of learned helplessness was originally conceptualized by American psychologist Martin Seligman and his research team "to describe the failure of dogs to escape a punitive environment, even when given the opportunity to do so." MARY ANN DUTTON, NAT'L ONLINE RSCH. CTR. ON VIOLENCE AGAINST WOMEN, UPDATE OF THE "BATTERED WOMAN SYNDROME" CRITIQUE 1-2 (2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf [<https://perma.cc/ER9E-BUG4>]. Walker applied this theory "to describe women's seeming lack of effort to leave or escape an abusive relationship or their failure or inability to take action to protect themselves and their children." *Id.* at 2. Seligman and his colleagues have refuted Walker's use of learned helplessness:

In sum, we think the passivity observed among victims/survivors of domestic violence is a middling example of learned

beatings because she feels responsible for them, which further contributes to a reluctance to report the battering.⁴³ To lay persons—and jurors—these behaviors can seem confusing and even contrary.⁴⁴ BWS theory can be an important tool to explain a victim’s inability or reluctance to leave her abuser—or displays of seemingly unprovoked violence—in situations of ongoing domestic violence.⁴⁵

Often, women with BWS have experienced abuse in other relationships as well.⁴⁶ Approximately sixty-eight percent of women in battering relationships revealed that they observed battering in their childhood homes, indicating a significant relationship between women who were exposed to domestic battering during childhood and those who experience it in adulthood.⁴⁷ Due to these individual factors, the psychological realities of BWS cannot be limited to one type of victim, because they are related to the particular experiences of individuals, not simply a prescriptive and predicted psychological reaction to violence.⁴⁸

helplessness. Passivity is present, but it may well be instrumental. Cognitions of helplessness are present, as is a history of uncontrollability. But there may also be a history of explicit reinforcement for passivity. Taken together, these results do not constitute the best possible support for concluding that these women show learned helplessness.

Id. (citing MARTIN SELIGMAN ET AL., *LEARNED HELPLESSNESS: A THEORY FOR THE AGE OF PERSONAL CONTROL* 239 (1993)).

43. See Barnes, *supra* note 41.

44. See DUTTON, *supra* note 42. See also WALKER, *supra* note 27, at 30. Walker explains that “the most asked question continues to remain, ‘Why don’t they leave?’” *Id.* The perception of individuals who have no experience with BWS is that leaving will stop the violence, however this is not the case. *Id.* The most dangerous part of a battering relationship is the point of separation and the period of two years following it. *Id.*

45. WALKER, *supra* note 27, at 30–31.

46. See *id.* at 91–94; see also Margot Shields et al., *Exposure to Family Violence from Childhood to Adulthood*, BMC PUB. HEALTH, Nov. 9, 2020, at 1, 7–8, 11–13 (indicating that childhood experiences of child maltreatment are associated with experiences of intimate partner violence in adulthood). Associations between childhood physical abuse and intimate partner violence were stronger for women than for men. *Id.* at 8. Additionally, “[a]mong women, a dose-response relationship emerged between each of the three types of [child maltreatment] [(childhood physical abuse, childhood sexual abuse, and childhood exposure to intimate partner violence)] and intimate partner violence in adulthood[.]” *Id.* at 8–11.

47. See WALKER, *supra* note 27, at 91–92.

48. Michaela Dunn, *Subjective Vulnerabilities or Individualized Realities: The Merits of Including Evidence of Past Abuse to Support a Duress Defense*, 54 SUFFOLK U. L. REV. 347, 355 (2021).

Although the theory of BWS has been accepted in many realms, it has also been subject to significant criticism.⁴⁹ One such critique of BWS is that it “lacks empirical support as a clinical syndrome.”⁵⁰ Critics contend that BWS is simply a “descriptive term that refers to the effects of abuse on a woman” rather than a syndrome which implies a diagnosis or psychological illness.⁵¹ Additionally, several feminist theorists have averred that characterizing battered women who kill their abuser as helpless is illogical and that Walker’s illustration of battered women as passive victims is a “stereotyped image of pathology.”⁵² This image is one that feminists have fought to overcome, and feminists believe the theory of BWS perpetuates it.⁵³ There is also criticism that this “stereotyped image of pathology” represents a paradigmatic victim, one who is ultimately a white, middle-class, heterosexual woman.⁵⁴ Further, Walker’s primary focus on a battered woman’s learned helplessness is “presented, interpreted, and heard as victimization.”⁵⁵ Despite these criticisms,

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49. See generally Paula Finley Mangum, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, B.C. THIRD WORLD L.J. 593, 593–94, 605–06 (1999) (noting that prosecutors began to use feminist theory in developing arguments in domestic violence cases and that defense attorneys criticized the use of those theories).
50. Sinead Flynn, *Battered Woman’s Syndrome: A Tragic Reality, an Evolving Theory*, 3 TRINITY WOMEN’S REV. 39, 44 (2019) (discussing Marilyn McMahon’s description of Walker’s empirical data and the criticisms thereof). Walker’s initial findings were based on a non-random sample of around 120 battered women and caseworkers in the United States and England. Marilyn McMahon, *Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome*, 6 PSYCHIATRY PSYCH. & L. 23, 26 (1999). The information was retrospective, as it was collected after the women had left their abusive partners, and the information was obtained from self-reported data. *Id.*
51. McMahon, *supra* note 50, at 37.
52. See Flynn, *supra* note 50, at 44–45; see also McMahon, *supra* note 50, at 34. The syndrome has been further criticized for labeling battered women as “inherently damaged,” which in the legal context, sends the wrong messages to judges and juries. Flynn, *supra* note 50, at 45.
53. See Mangum, *supra* note 49, at 604.
54. See Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 86–87 (2008) (“The word victim, then, implies whiteness, a construction that deprives African American women of victim status and its associated protections.”).
55. See Mangum, *supra* note 49, at 601, 606; see also Goodmark, *supra* note 54, at 84. An alternate theory, the survivor theory, purports that “the battered woman [is] a survivor who actively takes measures to protect herself and her children from within the relationship, rather than the passive victim immobilized by the failure of past efforts to forestall the violence and unable to leave her abuser.” *Id.* at 85. When a woman who has been battered repeatedly determines that help is not available to her, she may make the informed decision that she may be more likely to survive the

the theory of BWS has found widespread acceptance and is taught to counselors, police officers, prosecutors, parole board officials, and social-service providers.⁵⁶ It has also found use in the context of the legal field, specifically through the use of expert testimony to aid in criminal defense.⁵⁷

A. History of Battered Woman Syndrome in the Law

Use of BWS in the criminal defense context has changed over time.⁵⁸ Evidence related to BWS was first introduced into the criminal law context to support self-defense claims.⁵⁹ The woman presenting the claim was, in essence, providing a psychological basis for killing her husband or partner.⁶⁰ Although some states have limited the admissibility of expert evidence related to BWS to establish self-defense, BWS has recently been applied in other ways, including duress defenses, although this application is still somewhat conflicted.⁶¹ This section examines each of these defenses and will provide a critique of the arguments against using BWS evidence in criminal defense testimony.⁶²

1. Use of BWS Expert Testimony in Self-Defense Claims

Since the early 1980s, courts have recognized the relevance of domestic and intimate partner violence in criminal prosecutions.⁶³ In *Ibn-Tamas v. United States*, the defendant, Mrs. Ibn-Tamas, shot her husband multiple times after enduring years of violence at his hands.⁶⁴ The morning of the shooting, Mr. Ibn-Tamas allegedly

relationship if she stays and suffers the physical violence, than if she escalates it by attempting to leave. *Id.* Although this alternate theory has been better embraced by survivors, the legal system has been slower to accept it. *Id.*

56. See Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 221 (2002).

57. *Id.* at 225.

58. See Champaign, *supra* note 28, at 59–60.

59. *Id.* at 61.

60. *Id.* at 61–64. It is important to note that this is somewhat counterintuitive, as the BWS theory itself characterizes women who have been battered as passive non-actors but is used to justify the action of killing an abuser. See Goodmark, *supra* note 54, at 84.

61. See Champaign, *supra* note 28, at 63; see, e.g., *United States v. Nwoye*, 824 F.3d 1129, 1131–32 (DC Cir. 2016). *But see* *United States v. Willis*, 38 F.3d 170, 175–77 (5th Cir. 1994) (holding that evidence a defendant is suffering from BWS is inherently subjective and therefore not relevant to a duress defense).

62. See *infra* Sections II.A.1–2.

63. Barnes, *supra* note 41, at 330.

64. See *Ibn-Tamas v. United States*, 407 A.2d. 626, 628–29 (D.C. Cir. 1979).

threatened his wife multiple times with the loaded revolvers and shotguns he kept in the house and the adjoining office.⁶⁵ The defense was unable to prove that BWS was an established scientific theory, and the court denied Mrs. Ibn-Tamas the ability to present evidence of BWS.⁶⁶ However, this case opened the door to allow the admission of BWS evidence by the New Jersey Supreme Court in *State v. Kelly*⁶⁷ and thus its primary acceptance in the American legal landscape.⁶⁸ Expert testimony regarding BWS is admissible in the

65. *Id.* at 630.

66. *Ibn-Tamas v. United States*, 455 A.2d 893, 894 (D.C. Cir. 1983); *see also* Colin P. Holloway & Richard L. Wiener, *Abuse History and Culpability Judgments: Implications for Battered Spouse Syndrome*, 24 PSYCH., PUB. POL'Y, & L. 279, 280 (2018).

67. In *Ibn-Tamas*, the court insinuated that BWS evidence would be allowable if the defense was able to provide evidence that it was a properly established scientific theory. *Ibn-Tamas*, 455 A.2d at 894. This opened the door for future litigants to present sufficient evidence of the theory and, as such, have it admitted. *Id.*; *see also* Holloway & Wiener, *supra* note 66, at 280. Mrs. Gladys Kelly was married to her husband, Mr. Ernest Kelly, for seven years. *State v. Kelly*, 478 A.2d 364, 368 (N.J. 1984). During the marriage, Mr. Kelly frequently attacked Mrs. Kelly when he was drunk. *Id.* at 368-69. He often threatened to kill Mrs. Kelly and dismember her if she tried to leave him. *Id.* at 369. Mr. Kelly often moved out of the house after an attack but would later return, promising that he would change. *Id.* In May of 1984, Mrs. Kelly and her daughter Annette went to find Mr. Kelly, who was at his friend's home, to see if she could get more money for groceries. *Id.* Mr. Kelly told Mrs. Kelly she had to wait until they got home. *Id.* Shortly after they began walking home, Mr. Kelly, who was drunk, angrily asked Mrs. Kelly, "What the hell did you come around for?" *Id.* He grabbed the collar of her dress and choked her, punched her face, and bit her leg. *Id.* A crowd gathered around them on the street, and two men separated them just as Mrs. Kelly felt as though she would pass out from being choked. *Id.* Mrs. Kelly, unsure of where Annette had gone, left to look for her. *Id.* She found Annette holding her purse and then observed Mr. Kelly running towards her with his hands raised. *Id.* Fearing that Mr. Kelly had armed himself while she was looking for their daughter, and with concern that he had returned to kill her, she stabbed him with a pair of scissors from her pocketbook, killing him. *Id.* At trial, Mrs. Kelly's counsel attempted to introduce expert testimony on BWS to explain her state of mind and bolster her claim of self-defense. *Id.* The trial court excluded the testimony. *Id.* Mrs. Kelly appealed to the New Jersey Supreme Court to consider whether the trial court erred in its exclusion of the testimony. *Id.* The court found that the expert testimony was relevant to Mrs. Kelly's credibility, specifically by showing her experience was common to that of other women who had been in similarly abusive relationships. *Id.* at 375. Additionally, the court concluded that the testimony would have been relevant to the reasonableness of Mrs. Kelly's belief that she was in imminent danger of death or serious injury, as required to show self-defense. *Id.* at 377. This case was one of the first times a defendant successfully used a BWS defense. *See* Jessica N. Haven, *Battered Women Syndrome*, 9 GEO. J. GENDER & L. 593, 598 (2008).

68. *See generally* *Ibn-Tamas*, 455 A.2d 893; *see also* Holloway & Wiener, *supra* note 66, at 280.

majority of state courts in the United States as an affirmative theory of self-defense for criminal charges.⁶⁹ The ability to present evidence of BWS related to self-defense claims has generally arisen in the common law through judicial rulings, but some states have codified this defense.⁷⁰

Traditional self-defense doctrine indicates that physical force is justified if the actor reasonably believes that the force is necessary to prevent an imminent threat of unlawful physical force.⁷¹ This formulation presents major issues relevant to the self-defense claims of battered women.⁷² Two of the factors most at issue in these cases are whether: (1) the perceived threat is imminent, and (2) the belief that such a threat exists is a reasonable one.⁷³ This becomes complicated when women kill their husbands in situations where there is some question as to imminence or reasonableness.⁷⁴

69. Holloway & Wiener, *supra* note 66, at 280; *see generally* Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75 (1996).

70. Holloway & Wiener, *supra* note 66, at 280; *see also* Parrish, *supra* note 69.

71. *See* Burke, *supra* note 56, at 226; *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221–23 (3d ed. 2001) (discussing the general principles of self-defense).

72. *See* Burke, *supra* note 56, at 226.

73. *See id.*; *see also* Dressler, *supra* note 71, at 221–23 (discussing the general principles of self-defense). Burke notes that BWS evidence is not necessarily required in BWS cases. Where the facts of the case clearly warrant a claim of self-defense, a domestic violence victim is entitled to rely on the traditional doctrine, regardless of the presence of battering in the relationship (for example, a woman who shoots her husband while he is trying to stab her). *See* Burke, *supra* note 56, at 227.

74. *See* Burke, *supra* note 56, at 227. Mrs. JoAnn Hennem was convicted by a jury of murder after shooting her husband. *See* State v. Hennem, 441 N.W.2d 793, 794 (Minn. 1989). On the evening of the incident, Mr. Robert Hennem, her husband, came home from work and began screaming at her about what she was cooking for dinner. *Id.* at 795. Mr. Hennem saw some leftover oatmeal on the stove and hit Mrs. Hennem in the head with the pan and poured the oatmeal over her. *Id.* Mr. Hennem began pulling Mrs. Hennem around the room by her hair, asking that she prepare chili for him. *Id.* When she began to do so, Mr. Hennem threw her to the floor and pinned her with his hands on her throat. *Id.* Mr. Hennem continued to throw things at her until he eventually went into the bedroom and fell asleep. *Id.* at 796. This was not the first time Mr. Hennem had hurt Mrs. Hennem, and he sent her to the hospital on multiple occasions for a punctured lung, a ruptured spleen, and a broken nose. *Id.* at 795. While Mr. Hennem was sleeping that evening, Mrs. Hennem found a gun lying on the floor with a bullet sticking out of it. *Id.* at 796. She loaded the bullet, “went into the bedroom, closed her eyes, and fired the gun.” *Id.* Another similar case involved Mrs. Judy Norman, whose husband of twenty-five years, Mr. John Norman, forced her into prostitution at truck stops and subjected her to horrendous abuse while he was intoxicated, including beatings, putting cigarettes out on her, throwing coffee on her,

However, this is where advocates have found the use of BWS evidence the most useful.⁷⁵ Through the use of expert testimony regarding BWS, the defendant can show that she believed she was in imminent danger, that she used a reasonable amount of force to defend herself, and that she was not the original aggressor.⁷⁶ This has been a successful approach in many cases where the factors of imminency and reasonableness are not obvious from the overarching facts.⁷⁷

Courts and legislatures have addressed this issue in varying ways.⁷⁸ Some state legislatures “have amended their self-defense laws to make clear that prior domestic violence on the part of the decedent [is] admissible.”⁷⁹ Some courts have required trial judges to give a jury instruction explaining how BWS evidence is relevant to a self-

breaking glass against her face, and forcing her to eat out of a dog bowl. *See* State v. Norman, 378 S.E.2d 8, 9–16 (N.C. 1989). Mr. Norman also threatened numerous times to kill and maim her. *Id.* Mrs. Norman looked into having Mr. Norman committed and applying for social services benefits to support herself, but he interrupted her appointment to apply, brought her home, and told her he would kill her if she ever tried to leave him again. *Id.* When Mr. Norman got drunk and fell asleep, Mrs. Norman retrieved a gun from her mother’s house and shot him. *Id.* Mrs. Norman was convicted, and the Supreme Court of North Carolina held that a self-defense instruction would have been in error because the defense had not satisfied the imminency requirement. *Id.*

75. Holloway & Wiener, *supra* note 66, at 279.

76. *Id.* “Black’s Law Dictionary defined ‘imminent’ as ‘near at hand; mediate rather than immediate,’ but confusingly defines ‘imminent danger’ this way: ‘In relation to homicide and self-defense, this term means immediate danger.’” Whitley R.P. Kaufman, *Self Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 345 (2007) (citing *Imminent*, BLACK’S LAW DICTIONARY (5th ed. 1979), *Imminent Danger*, BLACK’S LAW DICTIONARY (5th ed. 1979)). The ambiguity surrounding the definition of imminence has created difficulty in assessing that element of self-defense, especially in cases where battered women defend themselves against their batterers. *See id.* at 345–46. Nonconfrontational cases, or cases where a woman attacks her abuser while he is not threatening her, sometimes while he is asleep or unconscious, create the most issues for women when attempting to assert self-defense. *Id.* at 346; *see e.g.*, cases cited *supra* note 74.

77. *See, e.g.*, People v. Goetz, 68 N.Y.2d 96, 114 (1986). The New York Court of Appeals indicated that determination of reasonableness in the context of self-defense must be based on “circumstances” facing a defendant or his “situation.” *Id.* These circumstances include “any relevant knowledge the defendant had about that person,” “the physical attributes of all persons involved,” and “any prior experiences [the defendant] had which could provide a reasonable basis for a belief that another person’s intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.” *Id.*

78. *See generally* Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155 (2004).

79. *Id.* at 162.

defense claim,⁸⁰ and other courts have taken the position that the reasonable belief element of self-defense must be evaluated by considering how a “reasonable battered woman” would have perceived the situation.⁸¹

2. Use of BWS Expert Testimony in Duress Claims

The use of BWS expert testimony to bolster claims of duress by defendants who have been subject to battering by their partners is less universally accepted.⁸² At the federal level, the Seventh Circuit,⁸³ the Ninth Circuit,⁸⁴ and the DC Circuit⁸⁵ have held that BWS evidence is admissible to support a duress defense, while the Fifth Circuit⁸⁶ and the Tenth Circuit⁸⁷ have indicated the contrary.

80. *Id.*

81. *Id.*; *see, e.g., Goetz*, 68 N.Y.2d at 114.

82. *See, e.g., United States v. Dingwall*, 6 F.4th 744, 746 (7th Cir. 2021) (holding that the presence of the threat is not always essential to a duress defense and that expert evidence of battering, and its effects, may be permitted to support a duress defense because it may inform the jury how an objectively reasonable person under the defendant’s circumstances might behave); *United States v. Lopez*, 913 F.3d 807, 811 (9th Cir. 2019) (holding that BWS evidence, including past experiences of abuse, provides context to the jury to better understand the defendant’s fear of her current abuser, to explain why she did not seek help from the police, and to rehabilitate her credibility); *United States v. Nwoye*, 824 F.3d 1129, 1136 (D.C. Cir. 2016) (holding that expert testimony on BWS can be relevant to the duress defense because it requires a defendant to have acted reasonably under the circumstances, and expert testimony can help a jury assess whether a battered woman’s actions were reasonable). *But see United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994) (holding that evidence that a defendant is suffering from BWS is inherently subjective and therefore not relevant to a duress defense); *United States v. Dixon*, 901 F.3d 1170, 1183 (10th Cir. 2018) (holding the courts may not consider whether a defendant’s conduct has been influenced by “non-tangible psychological conditions” such as battering and its effects because such a condition is not an “external, concrete” factor).

83. *Dingwall*, 6 F.4th at 746 (holding that the presence of the threat is not always essential to a duress defense and that expert evidence of battering and its effects may be permitted to support a duress defense because it may inform the jury how an objectively reasonable person under the defendant’s circumstances might behave).

84. *Lopez*, 913 F.3d at 811 (holding that BWS evidence, including past experiences of abuse, provides context to the jury to better understand the defendant’s fear of her current abuser, to explain why she did not seek help from the police, and to rehabilitate her credibility).

85. *Nwoye*, 824 F.3d at 1136, 1138 (holding that expert testimony on BWS can be relevant to the duress defense because it requires a defendant to have acted reasonably under the circumstances, and expert testimony can help a jury assess whether a battered woman’s actions were reasonable).

86. *Willis*, 38 F.3d at 175 (holding that evidence that a defendant is suffering from BWS is inherently subjective and therefore not relevant to a duress defense).

The Supreme Court has yet to address this split within the Circuit Courts.⁸⁸

Duress is generally defined as compulsion to commit a crime by threat or force.⁸⁹ The traditional framework for a duress claim consists of the following elements: (1) an immediate or imminent threat of death or serious bodily injury unless the defendant commits a criminal offense other than homicide; (2) a well-grounded fear or belief that the threat will be carried out; and (3) an honest and reasonable belief that committing the crime is the only way to avoid the threatened harm.⁹⁰ A duress defense can be used in a variety of offenses, including kidnapping, robbery, burglary, child abuse, drug offenses, and property crimes.⁹¹

Courts that do not admit evidence of BWS for the purpose of a duress defense generally do not because they find the evidence to be subjective and, therefore, irrelevant to the objective, reasonable person inquiry of a duress claim.⁹² This contrasts with a claim of self-defense, which adopts a hybrid objective-subjective approach to determine how a reasonable person would behave.⁹³

Notably, the Ninth Circuit has accepted BWS evidence for the purpose of supporting a duress defense.⁹⁴ In *United States v. Homick*, the court stated that “[a] BWS defense is a species of duress comprised of the following elements: ‘(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm.’”⁹⁵ Although the court did not allow BWS evidence to be used in that specific case, in a subsequent case, the court allowed evidence of past abuse to support an affirmative defense of

87. *Dixon*, 901 F.3d at 1183 (holding the courts may not consider whether a defendant’s conduct has been influenced by “non-tangible psychological conditions” such as battering and its effects because such a condition is not an “external, concrete” factor).

88. See cases cited *supra* note 82 (demonstrating conflicting views regarding the admissibility of BWS to support a duress defense).

89. *Duress*, DICTIONARY.COM <https://www.dictionary.com/browse/duress> [<https://perma.cc/9CZ5-SCJF>] (last visited Apr. 14, 2023).

90. Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Defendants*, 56 OHIO ST. L.J. 665, 697–98 (1995).

91. *Id.* at 668–69.

92. Kelly Grace Monacella, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 TEMP. L. REV. 699, 700 (1997).

93. Heather R. Skinazi, *Not Just a Conjured Afterthought: Using Duress as a Defense for Battered Women Who “Fail to Protect,”* 85 CAL. L. REV. 993, 997 (1997).

94. See Dunn, *supra* note 48, at 358–59.

95. *Id.* at 360–61 (citing *United States v. Homick*, 964 F.2d 899, 905 (9th Cir. 1992)).

duress.⁹⁶ In *State v. Lopez*, the court held that BWS evidence, including past instances of abuse by an intimate partner, provides context to the jury that is relevant to their ability to understand the defendant's fear of her abuser.⁹⁷

In contrast, in *United States v. Willis*, the Fifth Circuit held that BWS evidence is "inherently subjective," and, therefore, it is inconsistent with the objective-only reasonable person standard characteristic of duress defenses and is not relevant.⁹⁸ The court in this case indicated that evidence of BWS does not address "whether a person of reasonable firmness would have succumbed to the level of coercion present in a given set of circumstances[.]"⁹⁹ Rather, it "seeks to establish that[] because of [a] psychological condition, the defendant is unusually susceptible to the coercion."¹⁰⁰ The court acknowledged that although BWS evidence "provokes . . . sympathy," it "cannot provoke the application of [a] legal standard [of duress] whose essential elements are absent."¹⁰¹ The major argument against the use of BWS evidence is this notion that duress claims should only consider an objective reasonable person rather than take into account subjective elements of an individual's experience, perception, and circumstance.¹⁰²

III. THE REASONABLE PERSON

This section will examine the patriarchal and discriminatory reasons why courts allow personal or subjective circumstances, such as BWS, to be considered in self-defense cases but not in duress cases. The reasonable person is a significant figure in legal discourse.¹⁰³ It applies to a variety of legal circumstances, most notably in criminal and tort law.¹⁰⁴ Originally, the reasonable person

96. See *Homick*, 964 F.2d at 905–06; see also *United States v. Lopez*, 913 F.3d 807, 811 (9th Cir. 2019).

97. *Lopez*, 912 F.3d at 811.

98. *United States v. Willis*, 38 F.3d 170, 175–76 (5th Cir. 1994).

99. *Id.* at 175.

100. *Id.*

101. *Id.* at 177.

102. *Id.* at 175.

103. See *supra* Part III.

104. See *supra* Part III. As noted above, both self-defense and duress claims rely on the jury to determine how a reasonable person would react. While self-defense takes into account some subjective elements (i.e., the jury is allowed to consider how a "reasonable battered woman" would act in the situation), some courts have indicated that duress should be considered in a purely objective way. See *supra* Part III.

standard used today was termed the “reasonable man” standard.¹⁰⁵ The reasonable man standard has been described “as a descriptive model of human behavior and has a prescriptive norm for legal rules and adjudicative outcomes.”¹⁰⁶ One of the issues with this standard playing such a large role in legal rulings and outcomes is that the standard was created, and is continually enforced, predominantly by white men.¹⁰⁷ Although the reasonable man standard has been recently replaced by a more linguistically neutral “reasonable person” standard,¹⁰⁸ the reasonableness standard continues to be interpreted through a white male dominated lens.¹⁰⁹

In the modern legal landscape, the reasonable person is a phrase commonly used in tort and criminal law that is meant to “denote a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability.”¹¹⁰ There are two formulations of the reasonable person standard—a subjective standard and an objective standard.¹¹¹ A purely objective reasonable person standard is one that “excludes consideration of any of a [person’s] particular characteristics.”¹¹² This reasonable person is “devoid of gender, race, culture, religion, and any particular strengths or weaknesses.”¹¹³

105. Alena M. Allen, *The Emotional Woman*, 99 N.C. L. REV. 1027, 1031 (2021).

106. *Id.*

107. *Id.* at 1032. Early American law was created when societal structures dictated that women, non-white, and Indigenous people were subordinate to white men. Even today, the judiciary is dominated by white men. This impacts the ways of looking at what is reasonable or not, as that is “derive[d] from the point of view of those who dominate law-making in a given society.” *Id.*

108. *Id.*

109. Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 770 (1994). This overwhelmingly white male perspective existed historically and continues to persist across the government landscape in the United States. Alexandra Villarreal, *White Male Minority Rule Pervades Politics Across the US, Research Shows*, GUARDIAN (May 26, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/may/26/white-male-minority-rule-us-politics-research> [<https://perma.cc/UZ4D-2WZU>]. White men represent only 30% of the population but hold 62% of political offices, to include both chambers of Congress, state legislatures, and other state governmental roles. *Id.*

110. *Reasonable Person Standard*, THE FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/Reasonable+person+standard> [<https://perma.cc/6KWA-XRMJ>] (last visited Apr. 14, 2023).

111. *See, e.g.,* *People v. Goetz*, 68 N.Y.2d 96, 114–15 (1986). The New York Court of Appeals held that the jury could consider the fact that the defendant had been mugged in the past for the purposes of finding reasonableness of his use of self-defense. *Id.*

112. Nita A. Farahany & James E. Coleman, Jr., *Genetics and Responsibility: To Know the Criminal from the Crime*, 69 L. & CONTEMP. PROBS. 115, 154 (2006).

113. *Id.*

Jurors deciding cases based on an objective standard are asked to consider whether a reasonable person would have done the action in question.¹¹⁴ Conversely, in a subjective reasonable person standard, the reasonable person “is imbued with the defendant’s race, gender, class, level of education, and other personal characteristics.”¹¹⁵

The determination of which reasonable person standard should be used, and therefore what evidence can be presented, often turns on whether the defense proffered is a “justification” or an “excuse” defense.¹¹⁶ Self-defense, a justification defense, adopts a hybrid objective-subjective approach to determine how a reasonable person would behave, “which ensures that the jury fully understands the totality of the defendant’s actions from her own perspective.”¹¹⁷ Whereas duress, an excuse defense, excludes evidence crucial to understanding the reasonableness of a defendant’s choices.¹¹⁸ Scholars argue this is due to the perceived nature of justification and excuse defenses in the law.¹¹⁹ A justified action is something that is warranted, or something that is deemed morally appropriate by society, while an excused action is an action for which a person is not fully responsible.¹²⁰ More plainly, an excuse defense, such as duress, “excuses persons who have rationally and intentionally chosen to commit an unlawful act—persons who would ordinarily be held blameworthy.”¹²¹

Duress suffers from further prejudice in application by courts because it requires the defendant to have been coerced or compelled to do something against their will, which is a mental state that cannot be “empirically verified” by the court.¹²² This is one of the many

114. Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 8 (1998).

115. See Farhany & Coleman, *supra* note 112, at 154.

116. See Skinazi, *supra* note 93, at 1000–01.

117. *Id.* at 1011. Two of the most notable cases regarding the use of the hybrid subjective and objective standards are the Goetz and Menendez cases. V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1235 (2001). In December 1984, Bernard Goetz shot four young African-American teenagers on a New York Subway after they approached him and asked for five dollars. See *People v. Goetz*, 68 N.Y.2d 96, 99 (1986). Goetz was charged with murder, assault, reckless endangerment, as well as some firearms offenses. *Id.* at 102.

118. See Skinazi, *supra* note 93, at 1001.

119. See Kent Greenwalt, *Distinguishing Justifications From Excuses*, 49 L. & CONTEMP. PROBS. 89, 91 (1986).

120. *Id.*

121. See Doré, *supra* note 90, at 747.

122. See *id.*

reasons courts give for excluding subjective evidence when faced with duress claims.¹²³ Duress is rarely asserted at trial, and, when it is asserted, it is considered by judges, prosecutors, and defense attorneys to have a relatively low success rate.¹²⁴

In other contexts, outside of criminal law, courts have adopted additional standards subsequent to the generic reasonable person standard.¹²⁵ There are some cases in which the reasonable woman standard has been adopted successfully and has proven to be an important tool for justice.¹²⁶ The reasonable woman standard has been most widely accepted in sexual harassment cases.¹²⁷ In *Ellison v. Brady*, a 1991 case heard by the United States Circuit Court of Appeals for the Ninth Circuit, the court adopted a reasonable woman standard when evaluating a sexual harassment action brought under Title VII of the Civil Rights Act of 1964.¹²⁸ The court indicated that it adopted such a standard “primarily because [they] believe[d] that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”¹²⁹ The court further stated that it felt an analysis of harassment should be considered from the victim’s perspective and that a woman’s point of view was especially important in this context because “[c]onduct that many men consider unobjectionable may offend many women.”¹³⁰

The Third Circuit followed suit in adopting a reasonable woman standard in *Hurley v. Atlantic City Police Department*.¹³¹ However,

123. See generally *id.* (explaining that traditional duress is a “rare and exceptional defense,” whose “limits . . . are both narrowly drawn and extraordinarily demanding”).

124. See Neil P. Cohen et al., *The Prevalence and Use of Criminal Defenses: A Preliminary Study*, 60 TENN. L. REV. 957, 965 (1993) (indicating that judges, prosecutors, and defense attorneys estimated that duress is only asserted in trial between 0.1% and 0.2% of the time and that it prevailed at trial between 0% and 0.1% of the time).

125. See Forell, *supra* note 109, at 775.

126. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

127. See *infra* notes 128–31 and accompanying text.

128. See generally *Ellison*, 924 F.2d 872.

129. *Id.* at 879.

130. *Id.* at 878.

131. *Hurley v. Atlantic City Police Dep’t*, 174 F.3d 95, 115–16 (3d. Cir. 1999). The court adopted the reasonable woman standard as part of a test to determine whether a hostile work environment existed. *Id.* at 115–16. The court indicated that the evidence must be considered “from the perspective of a reasonable woman in the same position.” *Id.* They further defined this as looking “at the evidence from the perspective of a reasonable woman’s reaction to a similar environment under similar circumstances” and thus, “whether a reasonable woman would have been offended or harmed by the conduct in question.” *Id.* at 116. Here, a bright line was drawn

this adoption, even in the context of the hostile work environment, has not been universal and many circuits continue to use the reasonable person standard.¹³² Additionally, when given the opportunity in *Harris v. Forklift Sys., Inc.*, the Supreme Court did not comment on the legitimacy of the reasonable woman standard, despite the fact that the petitioner in the case argued that the gender-neutral reasonable person standard “tends to systematically ignore the experience of women.”¹³³

Although the reasonable woman standard has not garnered complete acceptance, even as applied to hostile work environment claims, there is support for its adoption. Proponents argue that in cases such as hostile work environment, the reasonable person standard, even one that is subjective, is insufficient.¹³⁴ The reasonable person standard is supposed to present a gender-neutral approach to the law, which is not appropriate when considering issues that are not gender-neutral in nature, such as sexual harassment.¹³⁵ The gendered nature of sexual harassment claims is evidenced by the following: ninety percent of sexual harassment cases involve women as the victims and men as the aggressors, women continue to hold less powerful positions in the labor market than men, and women are more likely to be victims of gender related

indicating that the reasonable woman standard “applies only to the issue of liability for hostile work environment [in] sexual harassment.” *Id.*

132. *See, e.g.*, *O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001) (stating that sexually objectionable conduct must be “both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive”); *Connor v. Schrader-Bridgeport, Int’l Inc.*, 227 F.3d 179, 192 (4th Cir. 2000) (“The conduct must be so severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive.”); *Shepherd v. Comptroller of Pub. Accounts of Tex.*, 168 F.3d 871, 874 (5th Cir. 1999) (“The challenged conduct must be . . . objectively offensive, meaning that a reasonable person would find it hostile and abusive”); *Curry v. Nestle USA, Inc.*, No. 99-3877, 2000 WL 1091490, at *5 (6th Cir. July 27, 2000) (holding that “all of the circumstances taken together [were] not sufficient to permit a rational trier of fact to conclude that a reasonable person would [have found] the harassment was sufficiently severe or pervasive to . . . create a hostile or abusive working environment.”).
133. *See* Brief for Petitioner at 36, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92-1168); *see also id.* at 21. The Supreme Court’s opinion primarily focused on the District Court’s erroneous finding that a cause of action does not exist under Title VII unless a plaintiff establishes that a psychological injury occurred. *Id.* at 22.
134. *See* Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 197 (2001) (“Feminists should argue for a legal standard that reflects the reality that all women encounter in American society.”).
135. *See id.* at 196–97.

violence and workplace harassment.¹³⁶ Further, even when women bring legal action against their attackers and harassers in the workplace, they are far more likely to encounter male judges in the legal system, who are ill-equipped to consider the female victim's perspective.¹³⁷ The issue with the reasonable person standard in this context is significant.

The reasonable person standard, previously called the reasonable man standard, has historically resulted in the exclusion of women and minorities from discussion of what is reasonable in the law.¹³⁸ Because of this, the reasonable person has acquired typically male traits in the legal landscape.¹³⁹ The reasonable person standard is particularly inadequate for sexual harassment claims or in other realms where the differences between men and women are profound.¹⁴⁰

IV. CONSIDERATION OF THE APPROPRIATE STANDARD IN BWS SELF-DEFENSE AND DURESS CASES

Women are treated far more harshly by the criminal legal system than men are when they kill their intimate partners.¹⁴¹ Men who kill their intimate partners receive an average prison sentence of two to six years.¹⁴² Conversely, women who kill their intimate partners are sentenced on average to fifteen years.¹⁴³ These statistics likely include women who presumably would have been able to proffer evidence of BWS in support of their self-defense claims.¹⁴⁴ Worse still, these statistics almost certainly include even more women who are unable to provide support for their duress claims with evidence of

136. *Id.* at 197.

137. *See id.* at 209 (“If women are predominantly the victims and men are predominantly the aggressors, how can feminists expect male judges to properly enforce the law that prohibits sexual harassment unless the judges consider the alleged conduct from the female victim's perspective?”).

138. *Id.* at 210.

139. *See id.* (“[T]he law has acquired the traditional male trait of being unemotional.”).

140. *See id.* These profound differences are pronounced in an area such as the workforce, which is “still not a level playing field for men and women” and where “what is objectionable to women is not always objectionable to men.” *Id.*

141. *Domestic Violence, The Battered Woman Syndrome, and Women Who Fight Back*, MICH. WOMEN'S JUST. & CLEMENCY PROJECT: CLEMENCY MANUAL, http://websites.umich.edu/~clemency/clemency_mnl/ch1.html [https://perma.cc/N5YU-KCN2] (last visited Apr. 14, 2023).

142. *Id.*

143. *Id.*

144. *See id.*

BWS.¹⁴⁵ Thus, it is vital that courts find some way to consider BWS evidence in these circumstances. This section will consider the arguments for use of a reasonable woman standard or a subjective reasonable person standard in the context of BWS evidence in support of self-defense or duress and ultimately conclude that the subjective reasonable person standard is most appropriate.

Many of the arguments that support the use of the reasonable woman standard in sexual harassment claims also apply for the purpose of self-defense and duress claims where BWS evidence is presented.¹⁴⁶ Statistics indicate that claims which bring in BWS evidence are primarily women's issues.¹⁴⁷ In 2013, fifteen times as many women were murdered by a man they knew than were killed by male strangers.¹⁴⁸ Of victims that knew their offenders, sixty-two percent were wives, common-law wives, ex-wives, or girlfriends of the offenders.¹⁴⁹ This evidence points to the fact that women are more likely to be victims of intimate partner violence, and they are far more likely to be killed by an intimate partner.¹⁵⁰ This is incredibly relevant for consideration in self-defense and duress claims involving BWS evidence.

However, the reasonable woman standard is likely not the best choice for use in a criminal law context.¹⁵¹ It has been argued that the implementation of a reasonable woman standard would be "inconsistent with the principle of formal equality that underlies the legal system as a whole and the reasonableness principle in particular."¹⁵² Additionally, feminists criticize the reasonable woman standard as a setback for women that has the effect of further exacerbating the existing gender hierarchy.¹⁵³ They warn, "[b]y

145. See generally Cohen et al., *supra* note 124, at 965, 967 (indicating that judges, prosecutors, and defense attorneys perceive the success rate of a duress defense as lower than that of self-defense).

146. See *supra* Sections I.A.1–2.

147. See *The Scope of the Problem: Intimate Partner Homicide Statistics*, VAWNET, <https://vawnet.org/sc/scope-problem-intimate-partner-homicide-statistics> [<https://perma.cc/UZ8V-ECEU>] (last visited Apr. 14, 2023).

148. *Id.*

149. *Id.*

150. *Id.*

151. See generally Robert Unikel, "Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326 (1992) (concluding that, despite its valid goals, the reasonable woman standard is ultimately ineffectual in the legal context).

152. *Id.* at 340.

153. *Id.*

dealing with women not as unique human beings but on the basis of statistical generalizations,” women will be continually confined to “sharply limited social roles and subordinate social status.”¹⁵⁴ The standard will lead to women being characterized as fragile and in need of rescuing by a primarily male judiciary.¹⁵⁵

Specifically, in negligence actions, and other similar cases, the adoption of the reasonable person standard has provided an acknowledgment of commonalities between men and women.¹⁵⁶ Additionally, applying a different standard for women in these situations would prompt stereotyping which would be unhelpful and potentially harmful to women.¹⁵⁷ For example, this might bring up certain stereotypes related to women, including but not limited to, that they are “mentally or morally weaker, or [that they are] more emotional, less rational, and less dependable.”¹⁵⁸ In these cases, a reasonable woman standard could be used to treat women as lesser than men rather than recognizing legally cognizable differences.¹⁵⁹ There is also concern that the reasonable woman standard is useless. Men and women understand and define conduct differently.¹⁶⁰ This inhibits male judges and jurors from being capable of adopting the viewpoint of a woman to effectuate the standard.¹⁶¹ Some scholars indicate that this standard is no more than an ineffectual change in vocabulary that makes little difference in terms of application.¹⁶²

154. *Id.* at 359 (quoting Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1053 (1979)).

155. *See* Kerns, *supra* note 134, at 223–24.

156. *See* Forell, *supra* note 109, at 775.

157. *Id.*

158. *Id.*

159. *Id.*

160. *See generally* Kelly P. Cosgrove et al., *Evolving Knowledge of Sex Differences in Brain Structure, Function, and Chemistry*, 62 BIOL. PSYCHIATRY 847 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2711771/> [<https://perma.cc/5DCA-8KSY>] (discussing the differences in cognitive abilities between men and women).

161. *See* Kerns, *supra* note 134, at 223.

162. Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. U. J. GENDER SOC. POL'Y & L. 633, 669 (2002). A study testing the use of the reasonable person standard and the reasonable woman standard was conducted using “162 undergraduate students at a mid-sized southeastern university.” *Id.* at 661. Authors of the study identified two cases from the hostile work environment literature which participants read and to which they responded. *Id.* at 662. One scenario was read under each standard. *Id.* at 663. The study indicated that “the reasonable woman standard had no effect on the determination of hostile environment for men.” *Id.* at 668. For female participants, the reasonable woman standard increased their confidence in a finding of sexual harassment. *Id.*

Though BWS is a women's issue, the reasonable woman standard runs the risk of becoming unwieldy and untenable in the criminal law context.¹⁶³ Defendants should be considered based on their individual experiences that lead them to involvement with the criminal legal system.¹⁶⁴ This is impossible using a reasonable woman standard, as gender is understood to exist on a spectrum.¹⁶⁵ If there is no true definition of "what it means to be a 'woman' or [a] 'man' and people experience these genders in different ways, then there can be no 'reasonable woman' . . . to model behavior from."¹⁶⁶ Further, it is impractical for one standard to represent the experiences of all women.¹⁶⁷ "By definition, the reasonable woman standard establishes certain expectations for women that are different than those for men."¹⁶⁸ The standard proscribes certain aspects of what a reasonable woman "should" do and how they "should" react in certain situations.¹⁶⁹

This is problematic for a multitude of reasons. First, the reasonable person standard tends to represent the values and norms of the dominant culture.¹⁷⁰ This effectively eviscerates the very purpose behind the reasonable woman standard, to make sure women's experiences are validated in the law, by denying different individuals the opportunity to explain why their actions were reasonable based on their circumstances.¹⁷¹ This is compounded by the fact that the

163. Alyssa Agostino, Note, *The Reasonable Woman Standard's Creation of the Reasonable Man Standard: The Ethical and Practical Implications of the Two Standards and Why They Should Be Abandoned*, 41 J. LEGAL PROF. 339, 347 (2017).

164. *Id.*

165. *Id.*

166. *Id.*

167. See Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1416 (1992). Cahn asserts this in the context of sexual harassment claims and states that "[w]omen define harassing behavior differently[,] [s]ome women accept as normal operating behavior actions that other women would equate with harassment[.]" *Id.*

168. *Id.*

169. See *id.* ("A reasonable woman is offended by workplace decorations that depict nude women; a reasonable woman will not go to a man's house at three a.m. (nor allow a man into her house at that time) unless she expects sex, and will report promptly to the authorities if her virtue is violated; a reasonable woman will not tolerate repeated battering or, if she does, she will certainly not respond aggressively or resort to violence herself.").

170. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 384 (1996) (indicating that objective standards have been criticized to "exclude the values of other groups in society").

171. See *id.* at 385.

battered woman who deserves sympathy in the legal context is “scared, helpless, meek, and blameless,’ ‘passive’ and ‘submissive,’ and ‘weak’ and ‘powerless.’”¹⁷² When a woman does not fit within this mold of the “paradigmatic victim” she is not afforded the ability to proffer a defense.¹⁷³ Similarly, there is some concern that the reasonable woman standard could be used in a way that would cause a regression for the feminist movement.¹⁷⁴ The reasonable woman standard is at risk of creating a threshold minimum amount of abuse that a woman has to endure in order for her actions to be considered reasonable instead of focusing on how the abuse impacted a particular defendant.¹⁷⁵

A more appropriate standard would be the use of a subjective standard of reasonableness, which considers a defendant’s individual circumstances across more criminal defenses—including duress.¹⁷⁶ This is especially important in the context of defendants who are misunderstood by the general public, such as a woman who kills after being in a prolonged battering relationship.¹⁷⁷ “We do not ask of the man in the barroom brawl that he leave the bar before the occurrence of an anticipated fight, but we do ask the battered woman threatened with a gun why she did not leave the relationship.”¹⁷⁸ Giving jurors an understanding of BWS and the impact that it can have on an individual can help them apply the elements of self-defense and duress in a fair and just way.¹⁷⁹ Admission of BWS evidence allows factfinders to understand how the “psychological realities of victims vary considerably from each other and deserve individual analysis.”¹⁸⁰

172. See Goodmark, *supra* note 54, at 83.

173. *Id.* at 84.

174. See Agostino, *supra* note 163, at 340, 346–48.

175. See Cahn, *supra* note 167, at 1416. Cahn states that in the context of sexual harassment, “[w]omen who have suffered the requisite type of conduct have been harassed or raped; others who suffer different types of behavior, or react differently to ‘accepted’ behaviors, have no claim.” *Id.* at 1416–17.

176. See *infra* notes 177–92 and accompanying text.

177. See *supra* note 82 and accompanying text.

178. See Nourse, *supra* note 117, at 1238.

179. See *id.* Imminence, an element of both self-defense and duress, is one of the elements that are regularly at issue in cases where a woman who has been battered is being held criminally liable. See *id.* at 1236–37. In these cases in particular, courts tend to equate “imminence with alternative courses of action: the defendant could have called the police, had the victim arrested, or taken advantage of a five-minute head start.” *Id.* at 1263 (footnote call numbers omitted).

180. See Dunn, *supra* note 48, at 368.

Duress, in particular, focuses on whether the defendant had a well-grounded fear or belief that a particular threat will be carried out and whether the defendant had an honest and reasonable belief that committing the crime was the only way to avoid the threatened harm.¹⁸¹ A proper inquiry into whether a defendant's fears and beliefs were reasonable implicitly requires the factfinder to consider external factors, as well as individual factors.¹⁸² "Otherwise, abuse victims are beholden to an interpretation of circumstances at the snapshot of a *crime* rather than a sincere and life-threatening moral dilemma" related to their abuse.¹⁸³

Although some courts have been resistant to the application of a subjective standard of reasonableness in duress cases,¹⁸⁴ the concern that this would result in a "slippery slope" of battered women acting with impunity long after the risk of battering has subsided and being absolved of any wrongdoing is exaggerated.¹⁸⁵ Some courts argue that, due to the nature of duress as an excuse defense, subjective evidence related to the defendant should not be considered.¹⁸⁶ However, courts that have adopted a subjective standard of reasonableness in this context have emphasized the importance of providing an appropriate background to factfinders to protect women who are victims of BWS and ensure more just outcomes.¹⁸⁷ Further, there is concern that subjective standards of reasonableness allow individuals "to set their own standards governing the permissible use of force" and that "[a] defendant who acts in an idiosyncratic manner can escape liability under a subjective standard if she sincerely believes it is reasonable to act[.]"¹⁸⁸ Nevertheless, the potential harm to marginalized groups outweighs this cost.¹⁸⁹ Providing BWS

181. See *supra* note 82 and accompanying text.

182. See Dunn, *supra* note 48, at 368.

183. *Id.* at 369.

184. See Dore, *supra* note 90, at 716.

185. See Nourse, *supra* note 117, at 1279–80 ("Critics from the left and right have no hesitation in likening battered woman to executioners.").

186. See *supra* notes 116–21 and accompanying text.

187. See *supra* note 82.

188. Lee, *supra* note 170, at 386. Lee cites the *Goetz* case as a prime example of this. See *supra* note 77 and accompanying text. Lee indicates that "[u]nder a subjective standard of reasonableness, if a defendant honestly but erroneously believes persons of a particular racial group are peculiarly susceptible to aggressive conduct, and acts on this belief by using deadly force against members of this racial group whenever he encounters them, the defendant may be acquitted." Lee, *supra* note 170, at 386.

189. See Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 818 (1992) (observing how the powerful will apply an objective reasonable person standard to preserve their own dominant social position).

evidence to the factfinder to prove a duress defense will simply dispel “preconceived notions about abuse victims who become controlled, and practically imprisoned, with no reasonable opportunity to escape” and allow them a glimpse of the “cumulative terror victims experience” which “makes danger acutely imminent to a victim of abuse, even when their abuser appears passive.”¹⁹⁰

Preventing admission of this evidence does not inhibit a “slippery slope”; rather, it inhibits women who have been battered from receiving a fair adjudication.¹⁹¹ A uniform acceptance of a subjective standard of reasonableness would effect a change in the criminal law outcomes for women as well as other marginalized populations whose individual attributes should be considered in the context of criminal adjudication.¹⁹² Reliance on a purely objective standard of reasonableness results in just outcomes only for the majority that create and control the legal system: the male, the white, the heterosexual.¹⁹³

V. CONCLUSION

Countless women, like Mrs. Ellis, have suffered from resistance to change in the legal system.¹⁹⁴ Fortunately, the use of evidence of BWS in criminal courts to bolster a woman’s claim of self-defense has seen an increased, albeit slow, acceptance over time.¹⁹⁵ This has

190. See Dunn, *supra* note 48, at 369.

191. *Id.*

192. See *supra* notes 170–80 and accompanying text. A truly objective reasonable person standard does not exist, therefore, the consideration of subjective factors creates more just outcomes. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1218 (1990). (“By emphasizing individual responsibility in the abstract form, the reasonable man standard . . . ignores the social reality of the individual’ As a result, any unequal social conditions that affect an individual’s situation are both perpetuated and condoned by such a standard. In short, the goal of employing an objective test that is unaffected by the judge’s (or any other) world-view and that is sufficiently general to apply to all people is simply an illusory one.”).

193. Sarah Lustbader, *The ‘Reasonable Person’ Looks a Lot Like Law Enforcement: Will That Change?*, THE APPEAL (Jan. 21, 2020), <https://theappeal.org/the-reasonable-person-looks-a-lot-like-law-enforcement-will-that-change/> [https://perma.cc/UR48-P2VJ]. “[I]t’s clear that there are various race and class assumptions baked into [the reasonable person] standard.” *Id.* “The reasonable man has been replaced by the reasonable person, but that person still functions within legal doctrines conceived by men and interpreted to fit the facts of men’s lives[.]” *Id.* ““But the equality concerns about the reasonable person in the law of provocation go well beyond gender’ Profound worries are also raised regarding sexuality and ethnicity.” *Id.*

194. See *supra* Section I.

195. See *supra* Section II.A.1.

proven to be a vital change for women who may have been otherwise convicted or punished more harshly because they killed their partner in situations where the immanency of the threat was not clear from the factual context.¹⁹⁶ Jurors and judges who have not experienced battery by a partner may not understand why Mrs. Hennem or Mrs. Norman shot their husbands while they lay sleeping.¹⁹⁷ The inherent and imminent danger in these situations may not be apparent to factfinders, but the introduction of BWS evidence provides context and ultimately results in fairer adjudications.¹⁹⁸

However, in many cases, the legal system has failed to extend this evidentiary context to those crimes in which a duress defense would be more appropriate than self-defense.¹⁹⁹ This is primarily because of the classification of the respective defenses as a justification defense versus an excuse defense and therefore requires the use of an objective versus a subjective reasonable person standard.²⁰⁰ Given that the criminal legal system treats women more harshly than men when they kill their intimate partners, the inability to bring in BWS evidence inhibits the dismantling of this patriarchal, majority-dominated system.²⁰¹ Although a reasonable woman standard could be considered as a substitute, a more general subjective reasonable person standard would be most appropriate.²⁰² This standard—which would allow for the consideration of a defendant’s individual circumstances—would promote fairer outcomes in situations where defendants choose to utilize a duress defense.²⁰³ Duress requires the factfinder to consider a defendant’s “honest and reasonable beliefs,” which is impossible without considering the defendant’s identity and individual circumstances.²⁰⁴ A change to this standard would not only provide more just outcomes for women but also for other marginalized populations who experience inequality within the criminal legal system.²⁰⁵

196. *See supra* Section II.A.1.

197. *See supra* note 74 and accompanying text.

198. *See supra* Section II.A.1.

199. *See supra* Section II.A.2.

200. *See supra* Section II.A.2.

201. *See supra* Part IV.

202. *See supra* Part IV.

203. *See supra* Part IV.

204. *See supra* Part IV.

205. *See supra* note 192 and accompanying text.

